how breathes from the pores of the Act, although it seems to be contradicted in every way by the words in detail. And it has occurred to me that it might be that when a combination reached a certain size it might have attributed to it more of the character of a monopoly merely by virtue of its size than would be attributed to a smaller one."

This view is elaborated in the article on the "Need of a National Incorporation Law" in our February number, which not only shows the need of, but indicates the authority for, the enactment of such a law.

It is interesting to note in this connection that one of the first published arguments on the general subject was made in "A STUDY OF THE UNITED STATES STEEL CORPORATION," published in 1901, wherein the writer, to whom we are now indebted for these two papers on a National Incorporation Law, reached the conclusion that combinations of this sort stock-holding corporations—were trusts within the meaning of the Anti-Trust Act, and violated both the National and State laws, and could be enjoined. In a review of this book in the *Harvard Law Review* (Vol. 15, p. 683), exception was taken to this "superficial" theory. The theory was, however, urged with great force by the Attorney-General in his argument in the Northern Securities Company Case, and Mr. Justice HARLAN holds, upon this point, as follows:—

"The stockholders of these two competing companies disappeared as such, for the moment, but immediately reappeared as stockholders of the holding company, which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held in one ownership. Necessarily, by this combination or arrangement, the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become practically one powerful consolidated corporation, by the name of a holding corporation, the principal, if not sole, object for the formation of which was to carry out the purpose of the original combination under which competition between the constituent companies would cease."

THE NORTHERN SECURITIES CASE.—The decision of March 14th in the case of *The Northern Securities Company* v. *United States*, was one of the most important and far-reaching decisions rendered by the Supreme Court of the United States in many years.

The question involved was whether the merger of the Great Northern and Northern Pacific Railway Companies into the Northern Securities Company, violated the National Anti-Trust Act (Act of July 2, 1890, 26 St. at L. 209), sections one and two of which provide: "§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any

such combination or conspiracy, shall be deemed guilty of a misdemeanor," etc. "§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor," etc.

The facts of the case are briefly: In 1901 the Great Northern and Northern Pacific Railway Companies, desiring a Chicago connection, purchased all of the stock (about $108,000,000) of the Chicago, Burlington & Quincy Railroad Company at $200 per share, for which the joint bonds of the two purchasing companies secured by the pledge of the stock purchased, were issued, creating a strong "community of interest" among the three companies operating over 19,000 miles of road. The Union Pacific Company, operating all of the other Pacific roads, except the Atchison lines, asked to be allowed to share in the Burlington purchase, and were refused; thereupon they began to buy Northern Pacific stock, and soon acquired $37,000,000 common stock, and $41,000,000 preferred—a clear majority of the $155,000,000; as soon as Mr. Hill of the Great Northern, and Mr. Morgan of the Northern Pacific, learned of this, they began to buy Northern Pacific common, creating the great Wall street panic of May 9, 1901, when Northern Pacific common sold for $1000 per share; they succeeded in purchasing $15,000,000 of the common, which, with the $26,000,000 they already owned, gave them a majority of the $80,000,000 common stock; this stock carried with it a provision for retiring the preferred stock at par on any January 1st; they immediately threatened to do this the following January; this led to a truce between the parties, and an agreement that the Northern Securities Company should be formed in New Jersey with a capital stock of $400,000,000 to take over as a holding, and not as a railroad, company, the shares of the Great Northern and the Northern Pacific companies; the transfers were promptly made by the shareholders of the companies, who received $115 of Securities stock for each $100 of Northern Pacific, and $180 Securities stock for each $100 Great Northern stock; the Union Pacific people received also something over $8,000,000 cash in addition. Very soon after the formation was complete, President Roosevelt, after taking the advice of Attorney-General Knox, directed him to bring suit against that company, the two railroad companies, and the leading directors of the Securities Company. The states of Minnesota and Washington, also, immediately brought suits against the Securities Company for violating their Anti-Trust Acts and Acts forbidding the consolidation of parallel lines of railways. These state cases are now pending in the Supreme Court of the United States. The history and facts of the various controversies have heretofore been given in this Review, in the articles on the Northwestern Railway Situation (1 MICH. L. REV. p. 251), and the note on Stockholding Corporations (2 MICH. L. REV. p. 134). The case just decided was decided the same way by the Circuit Court, Judge THAYER rendering a luminous opinion (*U. S.* v. *Northern Securities Company*, 120 Fed. R. 721), concurred in by Judges CALDWELL, SANBORN and VAN DEVANTER. This opinion was criticised by Judge LOCHREN, and he refused to follow it, in the suit of the *State of Minnesota* v. *Northern Securities Co.* (123 Fed. R. 692); it has been adversely reviewed by Mr. J. L. Thorndike ("The Decision in the Merger Case," Little,

Brown & Co. 1903), and Professor C. C. Langdell (The Northern Securities Case and the Sherman Anti-Trust Act, 16 *Harv. L. R.* p. 539; 17 *Harv. L. R.* 41), the latter contending: "It is clear that the Sherman Anti-Trust Act is a criminal statute pure and simple"; "that section 2 has no application to railways or railway companies"; and "That a more iniquitous decree was never made may be asserted with much confidence." Nevertheless, the opinion of Judge THAYER was affirmed, by the majority of the court, in every particular. The opinion of four members of the court is pronounced by Mr. Justice HARLAN, Justices BROWN, DAY, and MCKENNA, concurring; an opinion concurring in the result was delivered by Mr. Justice BREWER; Mr. Chief Justice FULLER, Mr. Justice PECKHAM, Mr. Justice WHITE, and Mr. Justice HOLMES, dissent.

In the past ten years there have been seven great cases decided by the Supreme Court involving the Anti-Trust Act; these are: *U. S.* v. *E. C. Knight Co.* (1895), 156 U. S. 1, decided by Mr. Chief Justice FULLER, six justices concurring, and Mr. Justice HARLAN dissenting; Mr. Justice JACKSON took no part; FIELD, GRAY, SHIRAS, and JACKSON, JJ. are no longer members of the court. This case held that the purchase of the shares of stock in four Philadelphia sugar refineries by the American Sugar Refining Company, giving the latter a practical monopoly of the sugar business throughout the United States, was not within the Act,—manufacturing not being commerce, and there being "nothing in the proofs to indicate any intention to put a restraint upon trade or commerce," and that trade might be *indirectly* affected, was insufficient. Mr. Justice HARLAN rendered a vigorous dissenting opinion, and it has been the view of many that the pleadings and proof on the part of the government were defective, or the result might have been different.

In the next five cases, *U. S.* v. *Trans-Missouri Freight Association* (1897), 166 U. S. 290; *U. S.* v. *Joint Traffic Association* (1898), 171 U. S. 505; *U. S.* v. *Hopkins* (1898), 171 U. S. 578; *Anderson* v. *U. S.* (1898), 171 U. S. 604; and *Addyston Pipe etc. Co.* v. *U. S.* (1899), 175 U. S. 211, WILGUS' CORP. CASES, 967, note 973, 1535, the majority opinion was delivered by Mr. Justice PECKHAM. In the last one the court was unanimous; in the Freight Association case, WHITE, J. pronounced a dissenting opinion, concurred in by FIELD, GRAY, and SHIRAS, JJ.; in the Traffic Association case, WHITE, GRAY, and SHIRAS, JJ., dissented, Justice FIELD having retired, and Justice MCKENNA taking no part in that case nor in the next two. The Freight and Traffic Association cases held that agreements between a great number of interstate railroad companies to establish and maintain rates throughout a large territory was forbidden by the Anti-Trust Act.

There is no doubt that these decisions led the railroad companies rapidly to take shelter under "community of interest" plans by means of inter-holdings of shares and of holding companies like the Securities companies. The *Hopkins* and *Anderson* cases held that unincorporated associations of commission merchants, and of buyers, dealing in live stock in Kansas City, fixing certain commissions, refusing to do business with any one, or to recognize any trader, unless he was a member, even though the area affected included several states and territories, was not forbidden by the Anti-Trust Act,— the *first*, because the business of the commission merchants was not interstate

commerce, and the *second*, because the rules of the exchange only indirectly affected such commerce, if at all. Mr. Justice HARLAN dissented in both cases, but pronounced no opinion. In the *Addyston* case, a combination of six manufacturers, supplying cast-iron pipe throughout thirty-six states was formed. Each order for pipe received by any one of the companies was to be referred to a committee consisting of representatives of each company; this committee fixed the price at which the pipe was to be furnished to any purchaser; then the various companies were asked to bid for the privilege of furnishing the pipe, and the one which offered the largest bonus to be divided among all, was to get the job. The other companies would then name a higher price to the purchaser than the one fixed upon by the committee and named by the one who was to get the job. All the court agreed that such a combination was forbidden by the Anti-Trust Act. The *Lottery Case* (1903), 188 U. S. 321, in no way involved the Anti-Trust Act, but the opinion by Mr. Justice HARLAN, shows how extensive the "commerce power" is. Mr. Chief Justice FULLER rendered a dissenting opinion, concurred in by Justices BREWER, SHIRAS, and PECKHAM. Mr. Justice BROWN had, in 1896, pronounced an opinion (Justices FIELD and BREWER dissenting), in the case of *Pearsall* v. *Great Northern Railway*, 161 U. S. 646 (WILGUS' CORP. CAS. 1413), holding that the ownership by the Great Northern Railway Co. of half the shares of the Northern Pacific Railway Co. was a virtual consolidation of parallel lines, violating the Minnesota statute forbidding such consolidation. Mr. Justice DAY had rendered an opinion while a member of the Circuit Court of Appeals, that a case somewhat similar to the *Addyston Case* violated the Anti-Trust Act. *C. & O. Fuel Co.* v. *United States* (1902), 115 Fed. R. 610.

Mr. Justice HARLAN thus states the government case:—

"The government does not contend that congress may control the mere ownership of a stock in a state corporation engaged in interstate commerce. It does not contend that congress can control the organization or mere ownership of state corporations, authorized by their charters to engage in interstate and international commerce. But it does contend that congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited by the constitution. It does contend that no state corporation can stand in the way of the enforcement of the national will, legally expressed. What the government particularly complains of, indeed all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies, which in violation of the Act of congress restrains interstate commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them."

In reply to an argument similar to one of Mr. Thorndike's, that the states have the right to authorize consolidations, and if the states had authorized this consolidation, the national government could not interfere, Justice HARLAN says:—

"But even if the state allowed consolidation, it would not follow that the stockholders of two or more state corporations engaged in interstate commerce could lawfully combine and form a distinct corporation to hold the stock of

the constituent corporations and, by destroying competition between them, restrain commerce among the states and with foreign nations."

* * * * * *

"Indeed, if the contentions of the defendants are sound, why may not all the railway companies in the United States that are engaged under the state charters, in interstate and international commerce, form a combination such as the one in question, and by the device of a holding corporation obtain the absolute control throughout the entire country of rates for passengers and freight, beyond the power of congress to protect the public against their exactions? The argument in behalf of the defendants necessarily leads to such results, and places congress, although invested by the people of the United States with full authority to regulate interstate and international commerce, in a condition of utter helplessness, so far as the protection of the public against such combinations is concerned."

The difficulties of the dissenting justices seem to be due largely to the form which the merger took, although Mr. Justice HOLMES holds the statute to be a criminal law, saying:—

"It is in vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment, and another way in one which seeks an injunction. I am no friend of artificial interpretations because the statute is of one kind rather than another, but all agree that before a statute is to be taken to punish that which has always been lawful, it must express its intent in clear words. So I say we must read the words before us as if the question were whether two small exporting grocers should go to jail."

The best classification that we recall as to what cases violate Sec. 1, is that given by Judge TAFT in his decision in *United States* v. *Addyston Pipe & Steel Co.* (85 Fed. R. 271, WILGUS, CORP. CAS. 967), and if the distinctions there pointed out were carefully considered, many difficulties involved in the question would be lessened.

The dissenting opinions seem to consider more whether certain hypothetical cases that might be put, are within the Act,—such as whether a partnership between individuals, or a purchase by one individual of competing concerns, or whether the national government can regulate the ownership of shares in corporations—than the actual facts of the case before the court; and Justice WHITE points out what perhaps is true, and what ought to be true if an Act of Congress is to be the supreme law of the land, if congress has the exclusive power over interstate and foreign commerce, and if such state charters authorized or permitted direct restraint of interstate commerce, viz.:—

"That it would be in the power of congress to abrogate every such railroad charter granted by the state from the beginning if congress deemed that the rights conferred by such state charters tended to restrain commerce between the states or to create a monopoly concerning the same.

"Besides, if the principle be acceded to, it must in reason be held to embrace every consolidation of state railroads which may do an interstate commerce business, even although such consolidation may have been expressly authorized by the laws of the states creating the corporation."

The Attorney-General puts this in such shape that it seems nearly self-evident: "It is settled law that interstate commerce cannot be regulated by state *constitutions*, nor by state *legislatures* . . . . nor by *corporations* created by state legislatures, acting through their *directors*. . . . Whence comes such power, then, to stockholders, if all the sources of all *their* rights and powers are impotent to defeat the law of congress?"

CONTROVERSIES BETWEEN STATES.—The clause in the Constitution conferring jurisdiction on the courts of the United States over "controversies between two or more states," was calculated, probably, more than any other, to substitute law in place of violence, and to bring to harmony a number of jealous and partly sovereign states. Even in "the imperfect system," as Hamilton termed the Articles of Confederation, some provision was made for a court, or rather a special board as the occasion might arise to adjust differences "concerning boundary jurisdiction or any cause whatsoever." Art. IX. It was essential to the peace of the Union, not only by reason of the interfering land claims, but also on account of the many other sources of animosity which had sprung up between the states, and because it was "warrantable to apprehend that the spirit which produced them will assume new shapes that could not be foreseen nor specifically provided against." THE FEDERALIST, No. 80. The necessity for the provision was so well perceived that in the first draft of the Constitution by the committee submitted to the constitutional convention on August 6, 1787, was contained—Art. XI., Sec. 3—the enactment that "all controversies between two or more states, except such as shall regard territory or jurisdiction," were to be settled by the courts of the United States. ELLIOT'S DEB. I., pp. 224, 229. Disputes concerning territory or jurisdiction were to be arranged by a court appointed by the senate. This limitation was struck out by the committee on revision, and in the report on September 12, 1787, the clause as it now stands was submitted. Art. III., Sec. 2, ELLIOT'S DEB., pp. 298, 303. This judicial authority, never before vested in any tribunal, is lodged by the terms of the Constitution in the Supreme Court, which has the power not only to hear and determine causes brought before it, but to command appearance by process and to enforce its judgments. MILLER ON THE CONSTITUTION, p. 328.

The scope of the "controversies," which was meant to be comprehensive (THE FEDERALIST, No 80), has been variously limited. It extends only to civil questions, *Chisholm* v. *Georgia*, 2 Dall. p. 431; involving generally rights of persons or property, *Georgia* v. *Stanton*, 6 Wall. p. 76; of a substantial nature, *New York* v. *Connecticut*, 4 Dall. p. 4. The jurisdiction of the Supreme Court will not extend to aid a state in the recovery of its "sovereignty and jurisdiction," *Rhode Island* v. *Massachusetts*, 12 Pet. p. 753; nor to suits by other political communities, *Texas* v. *White*, 7 Wall. p. 719; nor to contentions of a purely political nature, *Cherokee Nation* v. *Georgia*, 5 Pet. p. 28; nor "to a prosecution by one state of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other state at all." *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. p. 289. A state cannot invoke this jurisdiction by merely assuming